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No. 05-9222

IN THE
Supreme Court of the United States

LONNIE L. BURTON,
Petitioner,

v.

DOUG WADDINGTON,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

MOTION TO FILE
SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to Rule 25.5 of the Rules of this Court, Petitioner Lonnie Burton respectfully submits this supplemental brief to present a new authority that was not available at the time he filed his briefs on the merits or presented oral argument – specifically, the Washington Supreme Court's decision in *In re Personal Restraint Petition of VanDelft*, ___ P.3d ___, 2006 WL 3438048 (Wash. Nov. 30, 2006). The decision is reproduced in the accompanying Appendix.

In *VanDelft*, the Washington Supreme Court holds – consistent with the Washington Court of Appeals' recent decision in *State v. Washington*, 143 P.3d 606 (Wash. App. 2006), to which Petitioner adverted at oral argument, *see* Tr. of Oral Arg. 6 (Nov. 7, 2006) – that a sentence imposed exactly as Petitioner's was violated this Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004). The Washington Supreme Court explains that in order to run two sentences consecutively under Wash. Rev. Code § 9.94A.589(1)(a) (codified at § 9.94A.400 when Petitioner was sentenced), a trial court must make a factual finding "beyond the jury verdict." App. 11a. The Washington Supreme Court then reaffirms its prior holding in *State v. Hughes*, 110 P.3d 192 (Wash. 2005), that a finding that allowing a current offense to go unpunished is "clearly too lenient" is "a factual determination" that is covered by *Blakely*. App. 12a (quoting *Hughes*, 110 P.3d at 203). (*Hughes* explained that such a finding under longstanding Washington law is factual in nature because it requires a court to conclude that there was "some extraordinarily serious harm or culpability resulting from [the] multiple offenses." 110 P.3d at 202 (quotation omitted).).

The state-law underpinnings of *VanDelft* are, of course, binding on this Court. *See, e.g., Mullaney v. Wilbur*, 421 U.S. 684, 690-91 (1975). And they belie the State's representation here (*see* Resp. Br. 43-49 and Tr. of Oral Arg. 35) that no

factual finding beyond the jury verdict was necessary to run Petitioner's sentences consecutively. Finally, while the question whether Petitioner is ultimately entitled to federal habeas relief is not at issue here, *see* Petr. Reply Br. 19-20, the *VanDelft* decision rebuts the State's contention (*see* Resp. Br. 48) that Petitioner is not eligible for such relief because the trial court's decision to run his sentences consecutively did not violate *Blakely*. It is now beyond dispute that this case is a suitable vehicle to decide the questions presented concerning the retroactivity of *Blakely* because Petitioner has a serious argument for habeas relief.

CONCLUSION

For the forgoing reasons, as well as those stated in Petitioner's opening and reply briefs, this Court should reverse the decision of the Court of Appeals and remand the case for further proceedings.

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December 2006

2006 WL 3438048

Supreme Court of Washington.
In the Matter of the PERSONAL RESTRAINT
Petition OF William Raymond VANDELFT,
Petitioner.
No. 77733-1.

Nov. 30, 2006.

Appeal from Spokane Superior Court, 01-1-02317-0, Honorable Richard J. Schroeder, J.

Sheryl Gordon McCloud, Attorney at Law, Seattle, WA, for Petitioner.

Steven J. Tucker, Attorney at Law, Andrew J. Metts III, Spokane County Pros Offc, Spokane, WA, for Respondent.

BRIDGE, J.

¶ 1 William VanDelft was convicted of six crimes arising from five incidents in which he initiated contact with different boys and propositioned them for sex, using varying degrees of threats or violence. In this personal restraint petition, his second, VanDelft argues that the trial court's sentencing violated *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), by requiring VanDelft's sentence for kidnapping in the second degree with sexual motivation (count 1) to be served consecutively to his sentences for all other counts pursuant to RCW 9.94A.589(1)(a). We hold that since VanDelft's judgment and sentence became final after *Blakely* was decided and the principles announced in Blakely apply to consecutive sentences imposed under RCW 9.94A.589(1)(a), the trial court erred when it imposed count 1 consecutively

because the trial judge, not the jury, found that a concurrent sentence would be clearly too lenient.

I

Statement of Facts and Procedural History

¶ 2 VanDelft was convicted by a jury on April 3, 2002 in Spokane County Superior Court of one count of kidnapping in the second degree with sexual motivation (count 1), two counts of attempted kidnapping in the first degree with sexual motivation (counts 3 and 6), two counts of communication with a minor for immoral purposes (counts 2 and 4), and one count of intimidation with a dangerous weapon (count 5). The kidnapping and attempted kidnapping convictions were felonies, while the others were gross misdemeanors. RCW 9.41.270; RCW 9.68A.090; RCW 9A.40.020, .030; RCW 9A.28.020. The jury returned special findings of sexual motivation on the kidnapping and attempted kidnapping charges. The jury also returned special verdicts finding VanDelft used a deadly weapon other than a firearm when committing the second degree kidnapping and one of the attempted first degree kidnappings.

¶ 3 The convictions were based on five separate incidents that occurred between June 13 and September 12, 2001. *State v. VanDelft,* noted at 118 Wn.App. 1071, 2003 Wash.App. LEXIS 2364, at *2, *review denied,* 151 Wn.2d 1026, *cert. denied,* 543 U.S. 960 (2004).[1] The incidents

[1] In each incident, VanDelft engaged the boy in conversation and then attempted to lure or threaten the boy into his car. In some cases he explicitly asked for or demanded sexual favors, and in some cases he used a knife or gun to threaten violence if the boy refused to comply. *VanDelft,* 2003 Wash.App. LEXIS 2364, at *1-4 n. 1-n.4.

involved five boys, 11 to 14 years old, and took place at various locations around Spokane. In the only incident at issue here, VanDelft struck up a conversation with an 11-year-old and offered him a ride. VanDelft then grabbed the boy and pulled out a knife, but the boy was able to run away. VanDelft chased the boy and managed to pin him down, but the boy escaped again. For this incident, VanDelft was convicted of kidnapping in the second degree with sexual motivation (count 1).

¶ 4 VanDelft was sentenced on July 12, 2002. The sentence for each individual crime was within its standard sentencing range. RCW 9.94A.589(1)(b) expressly required the court to run the sentences for the two attempted first degree kidnapping counts consecutively because they are statutorily defined as serious violent offenses. The court also ordered the sentences for the second degree kidnapping (96 months for count 1) and the three gross misdemeanors to run consecutively to each other and to all other charges. The result was that each sentence would be served consecutively for a total of 315 months.

¶ 5 To support its conclusion that count 1 would be served consecutively to the other felony sentences even though it was not a serious violent offense, the trial judge entered findings of fact and conclusions of law. The judge found that the jury returned special verdicts finding sexual motivation on each of counts 2, 3, and 6 and deadly weapon enhancements on counts 1 and 6. He found that the defendant had an offender score of 15 on each of the three felony convictions. He found the sentences in the two attempted first degree kidnapping convictions would necessarily run consecutive to each other by operation of RCW 9.94A.589(1)(b). Finally, he found [t]hat given the defendant's offender score and that the crimes involved

several distinct criminal acts against five different victims, a concurrent sentence on Count I to the two serious violent offenses in Counts III and VI, would fail to hold the defendant accountable for all of the crimes for which he was convicted, since he would serve no additional time for Count I.

Findings of Fact and Conclusions of Law at 2. The court then ruled that a concurrent sentence on count 1 would result in a sentence that was "clearly too lenient" and determined that the sentence for count 1 would run consecutive to all other counts in this case. *Id.* at 3.

¶ 6 VanDelft appealed his convictions but not his sentence. *VanDelft,* 2003 Wash.App. LEXIS 2364, at *1. The Court of Appeals affirmed VanDelft's convictions in an unpublished opinion on October 16, 2003, and this court denied his petition for review on June 2, 2004. *Id.*; *State v. VanDelft,* 151 Wn.2d 1026, 94 P.3d 960 (2004). The Court of Appeals issued its mandate terminating review on June 16, 2004. In the meantime, in February 2004, VanDelft filed his first personal restraint petition in the Court of Appeals. That petition was dismissed on July 1, 2004. In his direct appeal, VanDelft had also filed a petition for writ of certiorari in the United States Supreme Court on June 25, 2004, which was ultimately denied on November 1, 2004. *VanDelft v. Washington,* 543 U.S. 960, 125 S.Ct. 417, 160 L.Ed.2d 325 (2004).

¶ 7 VanDelft, acting pro se, filed his second personal restraint petition at the Court of Appeals in February 2005, arguing his sentence violated *Blakely.* The Chief Judge of the Court of Appeals dismissed this personal restraint petition, relying on *State v. Evans,* 154 Wn.2d

438, 448-49, 114 P.3d 627, *cert. denied,* 126 S.Ct. 560 (2005), in which we held that *Blakely* does not apply retroactively to convictions already final when *Blakely* was decided. VanDelft then filed a motion for discretionary review in this court seeking review of the order dismissing his petition, which was granted.

II

Analysis

¶ 8 VanDelft argues that his convictions were still pending on review and not yet final when *Blakely* was decided. He asserts that the principles set forth in *Blakely* must be applied to his sentence, and he contends that the imposition of an exceptional consecutive sentence under RCW 9.94A.589(1)(a) violates *Blakely.* The State asserts that after this court's decision in *State v. Cubias,* 155 Wn.2d 549, 120 P.3d 929 (2005), *Blakely* does not apply to consecutive sentences that are otherwise within the standard range. The State also argues that VanDelft's petition should be barred because it is successive.

¶ 9 *Finality:* We have held that Blakely introduced a new rule of criminal procedure. *Evans,* 154 Wn.2d at 448. We apply a new rule for the conduct of criminal prosecutions retroactively "to all cases, state or federal, pending on direct review or not yet final." *In re Pers. Restraint of St. Pierre,* 118 Wn.2d 321, 326, 823 P.2d 492 (1992) (citing *Grifith v. Kentucky,* 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)). The Court of Appeals dismissed this personal restraint petition because the mandate on VanDelft's direct appeal was issued on June 16, 2004, but *Blakely* was not decided until June 24, 2004. Yet under Washington law, a judgment becomes final on the last of

the following dates: when the judgment is filed with the clerk of the trial court, when the appellate court issues its mandate terminating direct review, *or* when "the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal." RCW 10.73.090(3); *see also Grifith,* 479 U.S. at 321 n. 6. The United States Supreme Court denied VanDelft's petition for writ of certiorari on November 1, 2004, more than four months after *Blakely* was decided, so VanDelft's direct appeal was still pending and not yet final when *Blakely* was decided. The Court of Appeals erred when it dismissed VanDelft's petition.

¶ 10 *Successive Petition:* In its answer to VanDelft's motion for discretionary review, the State contends that the Court of Appeals correctly dismissed this petition, VanDelft's second, because it is successive. Under either RCW 10.73.140 (which applies only to the Court of Appeals) or RAP 16.4(d) (which applies to this court), a successive petition for similar relief must be dismissed absent good cause shown. *In re Pers. Restraint of Stoudmire,* 145 Wn.2d 258, 262-63, 36 P.3d 1005 (2001). Yet this is true only where the relevant issue was previously heard and determined on the merits. *Id.* at 263. In addition, a new issue cannot be raised in a successive petition to the Court of Appeals without a showing of good cause for the failure to raise the issue earlier. RCW 10.73.140.[2]

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[2] New issues in successive petitions are barred in this court by way of the abuse of the writ doctrine, which applies only where the petitioner has been represented by counsel throughout postconviction proceedings. In addition, the doctrine does not apply where the new issue is based on an intervening change in the law. *In re Pers. Restraint of Stenson,* 153 Wn.2d 137, 144-45, 102 P.3d 151 (2004).

¶ 11 When VanDelft filed his first personal restraint petition in February 2004, *Blakely* had not yet been decided. An intervening change in the law material to the petitioner's case can amount to good cause for a successive petition, and as noted above, *Blakely* announced a new rule. *Evans,* 154 Wn.2d at 448; *In re Pers. Restraint of Crabtree,* 141 Wn.2d 577, 583, 9 P.3d 814 (2000). Thus, Van Delft's personal restraint petition cannot be dismissed as successive because it raised a new issue not previously heard and determined on the merits, and there was good cause for not raising the issue previously. We therefore proceed to consider the merits of VanDelft's petition.

¶ 12 Blakely *Challenge to the Consecutive Sentence for Count 1:* VanDelft contends that the imposition of an exceptional consecutive sentence under RCW 9.94A.589(1)(a) violates the principles set forth in *Blakely.* RCW 9.94A.589 determines whether multiple felony convictions are sentenced concurrently or consecutively. Under RCW 9.94A.589(1)(b) (hereinafter (1)(b)), sentences for separate and distinct serious violent offenses, including attempted first degree kidnapping, "shall be served consecutively to each other and concurrently with sentences [for other felonies] imposed under (a) of this subsection." *See also* RCW 9.94A.030(41). Felonies that are not serious violent offenses "shall be served concurrently" under RCW 9.94A.589(1)(a) (hereinafter (1)(a)). Consecutive sentences for (1)(a) crimes may be imposed only "under the exceptional sentence provisions of RCW 9.94A.535." RCW 9.94A.589(1)(a).[3] Second degree kidnapping, the offense at

[3] Ordinarily, the multiplicity of separate and distinct nonserious violent felonies is accounted for under (1)(a) when each count is considered as criminal history with respect to the others, increasing the

(Continued on following page)

issue here, is not a serious violent offense, and therefore (1)(a) governs sentencing for that crime. RCW 9.94A.030(41).

¶ 13 RCW 9.94A.535 reiterates that a departure from the presumption of concurrent sentences for nonserious violent felonies is an exceptional sentence. At the time that VanDelft was sentenced, the illustrative factors listed in RCW 9.94A.535 that could support an exceptional sentence without additional jury findings included "[t]he operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter." Former RCW 9.94A.535(2)(i) (2002).

¶ 14 In this case, counts 3 and 6 (attempted first degree kidnapping with sexual motivation) were properly classified as separate and distinct serious violent offenses, and VanDelft concedes that they were appropriately sentenced consecutively under (1)(b). Pet'r's Suppl. Br. at 7-8. VanDelft also concedes that the statutory presumption of concurrent sentencing contained in (1)(a) does not apply to gross misdemeanors, and he does not challenge the consecutive sentencing for the three gross misdemeanors in this case.[4] *Id.* The consecutive sentence for count 1 (96 months for second degree kidnapping with sexual

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offender score for each count for purposes of calculating the standard range for each offense. RCW 9.94A.589(1)(a); *State v. Batista*, 116 Wn.2d 777, 783, 808 P.2d 1141 (1991).

[4] The maximum imprisonment for gross misdemeanors is one year where the punishment is not otherwise fixed by statute. RCW 9.92.020. The Sentencing Reform Act of 1981 (chapter 9.94A RCW), including RCW 9.94A.589, does not apply to misdemeanors. RCW 9.94A.010; *State v. Snedden*, 149 Wn.2d 914, 922, 73 P.3d 995 (2003); *State v. Whitney*, 78 Wn.App. 506, 517, 897 P.2d 374 (1995).

motivation) is the only portion of VanDelft's sentence affected by his current petition. *Id.* at 8.

¶ 15 The trial court imposed an exceptional consecutive sentence pursuant to (1)(a) for count 1 based on its conclusion that concurrent sentencing would "fail to hold [VanDelft] accountable for all of the crimes for which he was convicted." Findings of Fact and Conclusions of Law at 2. VanDelft's offender score was at least 15 based on his criminal history and the multiple current offenses, but the maximum offender score accounted for on the sentencing grid was 9. Report of Proceedings at 409; RCW 9.94A.510. As a result, VanDelft would receive no additional punishment for count 1 if it were served concurrently to the others. The trial judge concluded that concurrent sentencing for count 1 was therefore "clearly too lenient." Findings of Fact and Conclusions of Law at 3.

¶ 16 In *Apprendi v. New Jersey,* 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." In *Blakely,* the Court explained that the "'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely,* 542 U.S. at 303. In other words, the "statutory maximum" is the maximum that a judge may impose "*without* any additional findings." *Id.* at 304.

¶ 17 In *Cubias,* this court discussed the impact of *Apprendi* and *Blakely* on consecutive sentencing determinations made pursuant to (1)(b). 155 Wn.2d at 550. In that

case, the jury found Cubias guilty of three counts of attempted murder in the first degree. *Id.* Because the three counts were charged based on three different victims, the trial court imposed consecutive sentences for each count pursuant to (1)(b), which presumes consecutive sentences for serious violent offenses so long as the charges arose out of "'separate and distinct criminal conduct.'" *Id.* (quoting (1)(b)). Cubias argued the imposition of consecutive sentences in his case violated *Apprendi* and *Blakely* because the trial judge, not the jury, found that the three counts of attempted murder constituted separate and distinct criminal conduct. *Id.* at 550-51. We held that the principle set forth in *Apprendi* and *Blakely* did not apply and upheld the sentences imposed by the trial court. *Id.* at 551.

¶ 18 We explained that "in both *Blakely* and *Apprendi,* the United States Supreme Court was directing its attention to the sentence on a *single* count of a multiple-count charge." *Id.* at 553. Because the *Apprendi* Court contemplated only whether the sentence for a single count exceeded the statutory maximum, we reasoned that "*Apprendi* does not have any application to consecutive sentences; to conclude otherwise would extend *Apprendi's* holding beyond the narrow grounds upon which it rested." *Id.* at 554. We similarly reasoned that the *Blakely* Court was not concerned with consecutive sentences. *Id.* (citing *Blakely,* 542 U.S. at 299 n. 2). Even so, we also emphasized that Cubias had no entitlement under (1)(b) to serve concurrent sentences for multiple serious violent offenses. *Id.* at 554-55. Furthermore, in discussing a similar Court of Appeals case, we noted that the imposition of consecutive sentences under (1)(b) does not operate to elevate crimes to the equivalent of a greater offense. *Cubias,* 155

Wn.2d at 555 (discussing *State v. Kinney,* 125 Wn.App. 778, 106 P.3d 274 (2005)). We concluded that a trial court's imposition of consecutive sentences under (1)(b) "does not increase the penalty for any single underlying offense beyond the statutory maximum provided for that offense and, therefore, does not run afoul of . . . *Apprendi* and *Blakely.*" *Id.* at 556.

¶ 19 Then, in *State v. Louis,* 155 Wn.2d 563, 572, 120 P.3d 936 (2005), the companion case to *Cubias* and another (1)(b) case, we reiterated:

> the principle set forth in *Apprendi* and *Blakely* has no application to consecutive sentencing decisions so long as each individual sentence remains within the statutory maximum for that particular offense.

¶ 20 VanDelft argues that the *Cubias* rule should not apply to charges sentenced under (1)(a) because (1)(a) presumes sentences will be served concurrently and the presumption can be overcome only by a finding of an aggravating factor under RCW 9.94A.535. VanDelft is correct that the operative distinction between (1)(a) and (1)(b) is that under (1)(a) the defendant enjoys a statutory presumption of concurrent sentencing, but under (1)(b) he does not. In *Cubias* we emphasized that "[a] defendant has no right to serve concurrent sentences for committing multiple serious violent offenses [under (1)(b)]," but here VanDelft did enjoy a presumption of a concurrent sentence for count 1. 155 Wash.2d at 555. Indeed, the *Blakely* Court spoke in terms of the sentencing limits which a defendant is entitled to expect based on the jury verdict. *See Blakely,* 542 U.S. at 309. Unlike *Cubias,* the facts found by the trial judge in this case went beyond the jury verdict and changed the nature of the sentence that the defendant was

entitled to expect for count 1 from concurrent to consecutive. The trial judge's findings operated to elevate the punishment for a nonserious violent offense to the realm of punishment for serious violent offenses based on facts not reflected in the jury's verdict. *See Blakely,* 542 U.S. at 303; *Apprendi,* 530 U.S. at 494; *Kinney,* 125 Wn.App. at 783.

¶ 21 More importantly, there is no dispute that the legislature has characterized consecutive sentences imposed under (1)(a) as exceptional, requiring a finding of an aggravating factor for support. RCW 9.94A.535. In fact, in order to overcome the presumption of concurrent sentencing in (1)(a), the sentencing judge in this case employed the very exceptional sentencing scheme at issue in *Blakely. Blakely,* 542 U.S. at 299; RCW 9.94A.535. Moreover, there is no dispute that in *State v. Hughes,* 154 Wn.2d 118, 140, 110 P.3d 192 (2005), we held "[t]he conclusion that allowing a current offense to go unpunished is clearly too lenient is a factual determination that *cannot* be made by the trial court following *Blakely.*"

¶ 22 Given (1)(a)'s presumption of concurrent offenses and the exceptional nature of a consecutive sentence imposed for a nonserious violent felony, we conclude that the rule announced in *Cubias* applies only to consecutive sentences imposed under (1)(b). We hold that because (1)(a) requires the trial court to look to the exceptional sentencing scheme in RCW 9.94A.535 in order to impose a consecutive sentence for a nonserious violent felony, *Blakely* and *Hughes* squarely apply to consecutive sentencing decisions under (1)(a). Here the trial judge found that a concurrent sentence for count 1 would be clearly too lenient, a fact not reflected in the jury verdict, in violation of *Blakely* and *Hughes.* We reverse the Court of Appeals, grant the petition, and remand to the trial court for

resentencing of count 1 concurrent with the other counts. *See Hughes,* 154 Wn.2d at 156 (remanding for resentencing within the standard range).[5]

III

Conclusion

¶ 23 Because VanDelft's appeal was still pending and not yet final when *Blakely* was decided, his petition asserting a *Blakely* violation was improperly dismissed by the Court of Appeals. His petition is not successive. The trial court here imposed an exceptional sentence when it ordered VanDelft's sentence for count 1 to be served consecutively, and thus *Cubias* is inapplicable. The exceptional consecutive sentence for count 1 was based on facts found by the trial judge and not reflected in the jury verdict, in violation of *Blakely* and *Hughes.* We reverse the Court of Appeals, grant the petition, and remand for resentencing of count 1.

WE CONCUR: Justices TOM CHAMBERS, CHARLES W. JOHNSON, SUSAN OWENS, BARBARA A. MADSEN, MARY E. FAIRHURST and RICHARD B. SANDERS.

ALEXANDER, C.J. (dissenting).

¶ 24 The majority holds that the "*Cubias* rule" should not apply in this case. *See State v. Cubias,* 155 Wn.2d 549, 120 P.3d 929 (2005). In reaching its decision, it observes,

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[5] The United States Supreme Court recently held that *Blakely* error can be subject to harmless error analysis. *Washington v. Recuenco,* 548 U.S. ___, 126 S.Ct. 2546, 2553, 165 L.Ed.2d 466 (2006). However, because the State has never argued harmless error in this case, we decline to address that issue here.

"[William] VanDelft is correct that the operative distinction between [RCW 9.94A.589] (1)(a) and (1)(b) is that under (1)(a) the defendant enjoys a statutory presumption of concurrent sentencing, but under (1)(b) he does not." Majority at 12. Because I am unable to find an "operative distinction" between RCW 9.94A.589(1)(a) and (1)(b), I see no reason why our decision in *Cubias* does not control our review of VanDelft's sentence. Accordingly, I dissent.

¶ 25 In *Cubias,* we held that a trial court could impose consecutive sentences without a separate finding by a jury as to whether each count was separate and distinct. Majority at 10 (citing *Cubias,* 155 Wn.2d at 550). In affirming Cubias's sentence, we held that both *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004) did not have any application to consecutive sentences. *Cubias,* 155 Wn.2d at 554. As the majority correctly observes, the imposition of consecutive sentences " 'does not increase the penalty for any single underlying offense beyond the statutory maximum provided for that offense and, therefore, does not run afoul of . . . *Apprendi* and *Blakely.*' " Majority at 11 (quoting *Cubias,* 155 Wn.2d at 556).

¶ 26 In *Cubias,* we held that when a trial judge imposes consecutive sentences under (1)(b), he or she does not run afoul of *Blakely.* Here, we are faced with the question of whether a trial judge may impose consecutive sentences instead of a concurrent sentence under (1)(a). Thus, any departure from *Cubias* to invoke *Blakely* for sentences issued under (1)(a) depends upon finding a substantial difference between (1)(a) and (1)(b).

¶ 27 I am unable to find any difference between (1)(a) and (1)(b) that surmounts their similarities. The majority finds such a difference, indicating that "under (1)(a) the defendant enjoys a statutory presumption of concurrent sentencing, but under (1)(b) he does not." Majority at 12. It derives this presumption from the language of the two subsections. Concurrent sentences are "presumed" under (1)(a) because that provision says that consecutive sentences "may" be imposed, while concurrent sentences are *not* "presumed" under (1)(b) because that provision says that consecutive sentences "shall" be imposed.

¶ 28 For the majority, the difference between the two subsections, distilled to its essence, is a presumption of concurrent sentencing. Where the statute has a presumption of concurrent sentences under (1)(a), imposing consecutive sentences triggers *Blakely*. But, where the statute is *without* a presumption of concurrent sentencing under (1)(b), that is, where it allows for either a concurrent or consecutive sentence, imposing consecutive sentences does *not* trigger *Blakely*.

¶ 29 The flaw in the majority's reasoning is that our decision in *Cubias* did not turn upon what presumptions were found in (1)(b). It was not a critical factor. As noted above, *Cubias* turned upon a narrow reading of *Blakely*. There, we affirmed the imposition of consecutive sentences because *Blakely* gave instructions as to the range of only *individual* sentences. As the majority noted, we said in *Cubias* that "'in both *Blakely* and *Apprendi,* the United States Supreme Court was directing its attention to the sentence on a *single* count of a multiple-count charge.'" Majority at 11 (quoting *Cubias,* 155 Wn.2d at 553).

¶ 30 I fail to understand how the presence of a presumption for concurrent sentences somehow reverses the analysis we used in *Cubias*. This point is underscored by the dissent in *Cubias*. In it, Justice Madsen took specific issue with our emphasis on the singular nature of the sentences involved in *Blakely* and *Apprendi*. *See Cubias*, 155 Wn.2d. at 558 (Madsen, J., dissenting) ("For Sixth Amendment purposes, there is no difference between an exceptional sentence that increases the length of a sentence for one count beyond the presumptive range and an exceptional *consecutive* sentence that increases the presumptive length of incarceration."). Her argument demonstrates the axis upon which *Cubias* turned: whether *Blakely* applies is determined by examining each sentence in isolation – not by examining an amalgamation of those sentences. Because *Cubias* did not turn upon the lack of a presumption of concurrent sentences, I fail to see how our analysis in it is reversed by the presence of such a presumption. I respectfully dissent.

Justice JAMES M. JOHNSON, concurs.